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IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF ELLIOTT TURBOMACHINERY CORPORATION, CAPITAL-MERCURY SHIRT CO., RAPID INDUSTRIAL PLASTICS CO., INC., ALFRED C. TOEPFER INTERNATIONAL, INC., BUNGE CORPORATION, MONDIAL INTERNATIONAL CORP., NEW HOLLAND NORTH AMERICA, INC. AND FIRMENICH, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The *amici curiae* submitting this brief are, like Petitioner International Business Machines Corporation, exporters of commercial goods by ocean vessel.[1] Their cases remain before the Court of International Trade while this test case, selected by the trial court as the vehicle for appellate review of its decision granting interest on refunds of Harbor Maintenance Taxes, is further litigated. Some participated as *amici curiae* in the Court of International Trade and all participated as *amici curiae* in the Court of Appeals for the Federal Circuit when this case was before those courts. They have a substantial stake in the outcome of the question for which review is sought—whether petitioner and others similarly situated are entitled to interest on refunds of unlawfully collected Harbor Maintenance Taxes.

This *amicus curiae* brief is being filed with the consent of all parties. Letters of consent from counsel have been lodged with the Clerk of the Court.

STATEMENT

This case concerns the federal Harbor Maintenance Tax (HMT), 26 U.S.C. §§ 4461-62, an ad valorem tax imposed since 1987 on merchandise imported into, and exported from, the United States by ocean vessel. In *United States v. United States Shoe Corp*, 523 U.S. 360 (1998), this Court held that the tax, as imposed on exports, was unconstitutional as a

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[1] No counsel for any party authored any part of this brief. No persons other than *amici curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

The *amici curiae* are Alfred C. Toepfer International, Inc., Bunge Corporation, Capital-Mercury Shirt Co., Elliott Turbomachinery Corp., Firmenich, Inc., Mondial International Corp., New Holland North America, Inc., and Rapid Industrial Plastics Co., Inc.

violation of the Export Clause (art. I, § 9, cl. 5) of the Constitution of the United States.

The current litigation arose because of the refusal of the United States to pay interest to the thousands of taxpayers eligible for HMT refunds following the Court's decision invalidating the tax as to exports, and presents the question of whether the United States is obliged to pay such interest. The trial court designated petitioner's case against the United States as a test case in which the United States could seek appellate review of that court's decision to award such interest under 28 U.S.C. § 2411 (providing for interest on certain refunds of internal revenue taxes). *International Bus. Machs. Corp. v. United States*, 20 Ct. Int'l Trade 206 (1996).

The trial court's decision was reversed by the Court of Appeals for the Federal Circuit (*International Bus. Machs. Corp. v. United States*, 201 F.3d 1367 (1999)) which held that neither 28 U.S.C. § 2411 nor two statutes providing for interest on refunds of customs duties (19 U.S.C. § 1505(c) and 28 U.S.C. § 2644) authorized payment of interest on HMT refunds.

SUMMARY OF ARGUMENT

In *United States Shoe*, this Court held that the Harbor Maintenance Tax, a tax codified in the Internal Revenue Code but required to be administered as a customs duty, was an unconstitutional tax on exports. *United States Shoe*, 523 U.S. at 363. In 28 U.S.C. § 2411 (1994), Congress authorized interest on refunds of "*any* internal-revenue tax" (emphasis added), and in 19 U.S.C. § 1505(c) (1994 & Supp. IV 1998), Congress authorized interest on customs duty refunds. In view of these statutory directions to award interest on tax and customs duty refunds, it was unremarkable that, when the Court of International Trade held the HMT assessed on exports to be in violation of the Constitution, it ordered that the unconstitutional exaction should be refunded "together

with interest and costs as provided by law." *United States Shoe Corp. v. United States*, No. 94-11-00668 (Ct. Int'l Trade, Dec. 4, 1995). When the trial court's judgment was affirmed by the Court of Appeals for the Federal Circuit (*United States Shoe Corp. v. United States*, 114 F.3d 1564 (1997)) and by this Court (*United States Shoe*, 523 U.S. 360), it was similarly unremarkable that there was no separate comment concerning the award of interest.

But there is something remarkable—and fundamentally wrong—about the decision below on which review is sought. Despite clear statutory direction to the contrary, that decision holds that no interest is due on refunds of the HMT imposed on exports. In holding that Congress did not authorize interest on refunds of the HMT imposed on exports from the United States, the Court of Appeals for the Federal Circuit misinterpreted the decision of this Court in *United States Shoe* which held the tax unconstitutional, and it misread the HMT statute, under which Congress authorized the payment of interest on HMT refunds in the same manner that Congress has authorized interest on refunds of income taxes and customs duties generally.

If, however, statutory grounds do not support interest, then there is a compelling constitutional argument that the exaction of an unconstitutional tax implicates a taxpayer's right to just compensation under the Takings Clause of the Fifth Amendment. The thoughtful words of Judge Learned Hand in *Procter & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924), ring ever so true in the context of the issues presented in the petition for a writ of certiorari:

> [I]t seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. . . . [I]n

> modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

Amici curiae respectfully submit that the Court should accept both the statutory and constitutional issues for review. Each of these points is separately addressed below.

ARGUMENT

I. THE COURT OF APPEALS MISREAD THE GOVERNING STATUTES

A. The Legislative Setting of the HMT

The HMT is an administrative law hybrid. The statute was codified in Title 26 of the United States Code, the Internal Revenue Code, but Congress provided that it was to be treated as a customs duty, under Title 19 of the United States Code. *See* 26 U.S.C. § 4462(f)(1) (1994) ("all administrative and enforcement provisions of customs laws and regulations shall apply . . . as if such tax were a customs duty"), and 26 U.S.C. § 4462(f)(2) (1994) (for jurisdictional purposes, the tax "shall be treated as if such tax were a customs duty"). Thus, the HMT was given its legislative birth in the tax code, where it remains, but was to be administered and enforced as part of the customs laws of the United States.

One problem encountered by this hybrid legislation was determining which federal court had jurisdiction to hear constitutional challenges to the tax. Claims of unconstitutionality were initially brought in federal district courts, the Court of Federal Claims, and the Court of International Trade. The controversy over jurisdiction was among the issues addressed in *United States Shoe*, where the Court held that federal court jurisdiction existed under 28 U.S.C.

§ 1581(i), a statute establishing so-called "residual jurisdiction" in the Court of International Trade over cases against the United States arising from imports. 523 U.S. at 365-66.

In so holding, the Court affirmed the application of a jurisdictional statute, nominally applicable only to *imports*, to a challenge to the HMT on *exports*. The Court read the import terms of 28 U.S.C. § 1581(i) consistent with Congress' intent to apply the customs laws (which, by definition, apply only to imports) to the import *and* export applications of the HMT:

> This dispute, as the Federal Circuit stated, "involve[s] the 'administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§]1581(i)(1)."

United States Shoe, 523 U.S. at 366 (citation omitted).

Thus, the Court interpreted as applicable to exports a jurisdictional statute which applied, by its terms, *only* to imports, because it concluded that is what Congress intended when it provided that the HMT was to be administered as a customs duty.

B. The Court of Appeals Incorrectly Held That Congress Did Not Authorize Interest on HMT Refunds.

1. *The Customs Duty Interest Statute is Applicable*

The Court of Appeals for the Federal Circuit departed from Congress' direction that "all administrative and enforcement provisions of customs laws and regulations shall apply . . . as if such [Harbor Maintenance] tax were a customs duty" (26 U.S.C. § 4462(f)(1) (1994)) when it refused to find statutory authority in the customs laws for interest on refunds of HMT payments in respect of exports. If the HMT on exports were a customs duty, the customs laws (in 19 U.S.C. § 1505(c)) would provide for interest on refunds of it. Since the Court previously held, in the jurisdictional context, that Congress intended customs statutes with wording limited to imports to be applied to exports under the HMT, the customs law interest statute should have been interpreted, in the same way, to apply to refunds of the HMT imposed on exports.[2]

The customs duty interest provision of 19 U.S.C § 1505(c) (1994 & Supp. IV 1998) reads:

> Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees and interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

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[2] The applicability of 19 U.S.C. § 1505(c) to Petitioner's interest claim was addressed in the court of appeals, but was not among the specifc questions for which Petitioner sought review. Because of its importance to this case, the court should include this question as one for which review is granted. The Court has taken such action in the past. *See, e.g., Paris Adult Theatre I v. Slaton*, 408 U.S. 921 (1972).

This interest statute is, in its own way, comparable to 28 U.S.C. § 1581(i), the jurisdictional statute applicable to import duties, which the Court held authorized jurisdiction over an export tax. Section 1505(c) refers to imports (using the terms "importer of record," "estimated duties"), just as the jurisdictional statute (referring to "revenue from imports") did, and yet the Court in *United States Shoe* held that the jurisdictional statute was applicable to export taxes under the HMT.

The court of appeals rejected Section 1505(c) as "contemplat[ing] an entirely different factual scenario from the [case involving exports] before us." *International Bus. Machs.*, 201 F.3d at 1374. But the use of import-related language in the jurisdictional statute, coupled with the provision in the HMT statute that "the tax imposed by this subchapter shall be treated as if such tax were a customs duty" (26 U.S.C. § 4462(f)(2) (1994)) allowed this Court to hold that a statute authorizing suits against the United States arising out of imports was intended by Congress to authorize suits arising out of exports.

The Court's approach to statutory interpretation of the HMT legislation and due regard for congressional intent should similarly have led to the conclusion that Section 1505(c) authorized interest on refunds of HMT export taxes, based on the HMT statute that provided that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter . . . as if such tax were a customs duty. . . ." 26 U.S.C. § 4462(f)(1) (1994). The sterile statutory analysis of the court of appeals simply failed to recognize, as this Court recognized in *United States Shoe*, the breadth of Congress' direction to treat HMT payments as customs duties.

2. *Congress Could Not Have Intended to Exclude Refunds of Export-Related HMT Payments from an Interest Requirement, When It Authorized Interest on Income Taxes and Other HMT Refunds.*

If, on the other hand, the HMT on exports is treated for interest purposes not as a customs duty but as an internal revenue tax because of its codification in the Internal Revenue Code, 26 U.S.C., then 28 U.S.C. § 2411, which authorizes interest on judgments for overpayments of income taxes, provides the authorization for interest on refunds on HMT payments. The Court of International Trade held that interest was payable under 28 U.S.C. § 2411, and the court of appeals acknowledged that the provision would be applicable to refunds of HMT taxes but for its reading of the phrase "administration and enforcement" in 26 U.S.C. § 4462(f)(3) as precluding the application of this internal revenue interest statute to the HMT. *International Bus. Machs.*, 201 F.3d at 1372.

If, for some reason, the customs interest statute is not read as authorizing interest on HMT export tax refunds, then the internal revenue interest statute must be applicable. The language excluding laws relating to the "administration and enforcement of internal revenue taxes" from the HMT does not embrace an interest statute found in the Judiciary and Judicial Procedure title of the U.S. Code, which statute by its terms concerns not Executive Branch "enforcement" of tax laws, but the judicial action of issuing judgments for tax refunds. 28 U.S.C. § 2411 (1994).

But the court of appeals' decision—excluding from application *both* the customs duty refund interest statute and the internal revenue refund interest statute—has created a situation in which a refund of the HMT on exports, which can only be governed by the income tax laws and customs laws, is not subject to interest, while the refund of a tax codified and

administered as a tax, and the refund of a customs duty codified and administered as a customs duty, are subject to interest. The decision below has thus created an anomaly among federal laws imposing taxes on income and on goods in international commerce. If the court of appeals is correct, then refunds by the United States on HMT taxes in respect of exports, alone among income taxes and customs duties, would be payable free of interest.

When Congress anchored the HMT in both the income tax and customs laws, it surely did not intend that there would be any aspects of the HMT that would fall in some crevice between them. Thus, when Congress provided, in 26 U.S.C. § 4462(f)(3) (1994), that "[t]he tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes," it filled that exclusion with the administrative and enforcement provisions of the customs laws:

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter . . . as if such tax were a customs duty . . . .

26 U.S.C. § 4462(f)(1) (1994).

Both customs and internal revenue laws clearly provide that payors of the charges imposed thereunder are to receive interest on refunds of tax payments in excess of those required by law. Thus, the court of appeals could not have correctly read the HMT legislation as not providing for interest on refunds of the HMT in respect of exports, when Congress authorized interest on refunds of:

- internal revenue taxes (where Congress codified the HMT),

- customs duties (under which laws Congress directed that the HMT be administered), and
- the HMT imposed on imports.[3]

It is neither logical nor reasonable to conclude that Congress did not intend the interest provisions of at least one of these bodies of law to apply to refunds of the HMT imposed on exports. The effect of the court of appeals holding, however, is to create such an interest gap.

Accordingly, in addition to the reasons stated in the petition, the writ should be granted to review whether the appellate court's decision has allowed the United States to fail fully to implement this Court's unanimous decision in *United States Shoe* invalidating the HMT as applied to exports. The writ should also be granted to review whether the court of appeals has created an anomaly in the law by holding that interest on one particular federal tax refund was not authorized by Congress, where Congress has authorized interest on refunds of every other income tax and customs duty it has imposed.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE PETITION TO REVIEW WHETHER THERE WAS AN UNCONSTITUTIONAL TAKING OF INTEREST EARNED ON HMT EXPORT TAXES.

In promulgating the HMT on exports, the Government ventured into the one area constitutionally protected from its

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[3] Any challenge to the imposition of the HMT on imported goods would be made via a protest of the Customs Service liquidation of the applicable entry. Interest on a refund paid as a result of the protest and a decision of the Court of International Trade would be authorized by 28 U.S.C. § 2644. Interest on a refund paid administratively by the Customs Service would be authorized under 19 U.S.C. § 1505(c).

quest for revenue—export taxes. Having been forced by the Court's decision in *United States Shoe* to return exactions collected through the exertion of a power expressly forbidden to it under the Constitution, the United States nevertheless asserts that the cloak of sovereign immunity permits it to retain the benefit of the millions of dollars in interest accrued as a result of its unlawful exactions. *Amici curiae* submit that the Takings Clause of the Fifth Amendment does not permit such injustice.

And so, in addition to the statutory question presented, the Court should also grant certiorari in order to consider the underlying question—Question 3 presented in the petition—of whether the just compensation guarantee under the Takings Clause of the Fifth Amendment requires the payment of interest here as part of the "full and perfect equivalent for the property taken". *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

A. The HMT on Exports Effected a Taking of Private Property Under the Fifth Amendment

Although the Constitution places certain limitations on Congress' taxing power such as appear under the Uniformity Clause[4] and the Port Preference Clause[5], the Export Clause is the single express prohibition on the Government's power to tax. Accordingly, when Congress enacted Section 4461(c)(1)(B), which taxed exports in violation of the Export Clause, it exerted a power expressly forbidden and denied to it under the Constitution. In so doing, the Government has

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[4] "[A]ll duties, Imposts, and Excises shall be uniform throughout the United States." U.S. Const. art I, § 8, cl. 1.

[5] "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ." U.S. Const. art. I, § 9, cl. 6.

confiscated taxpayers' property, and the Takings Clause requires that just compensation under the Fifth Amendment be paid.

The Takings Clause of the Fifth Amendment affirmatively declares, "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. This Court has recognized that a tax imposed despite an express prohibition against such legislation may give rise to a taking under the Fifth Amendment:

> Except in rare and special instances, the . . . Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution . . . . That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and *forbidden* power, as, for example, the *confiscation of property* . . . . [or] if the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power *denied* by the Federal Constitution . . . .

Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (emphasis added). *Accord Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1 (1916), and *Stewart Mach. Co. v. Davis*, 301 U.S. 548 (1937).

The court of appeals ignored the effect of this Court's precedents in denying interest on HMT payments collected in contravention of an express constitutional prohibition, and the Court should thus also grant review to consider the Takings Clause question thereby raised.

B. Just Compensation Includes Interest Earned On HMT Export Taxes From the Date of the Taking To the Date of Payment of Principal.

In holding that the United States is immune from the payment of interest on HMT refunds, the court of appeals characterized the issue as one of statutory interpretation to determine "whether Congress has expressly authorized interest on HMT refunds." *International Bus. Machs.*, 201 F.3d at 1370. Relying primarily on *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the court of appeals ruled that the United States' sovereign immunity foreclosed an award of interest in this case, as Congress had not waived that immunity through express statutory consent. *Id.*

But as emphasized by the Court in *Shaw*, the general rule of statutory waiver is inapplicable to constitutional claims for just compensation:

> *Apart from constitutional requirements*, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States. *The 'constitutional requirement'* arises in a taking under the Fifth Amendment. To satisfy the constitutional mandate, 'just compensation' includes a payment of interest.

Shaw, 478 U.S. at 317 & n.5 (emphasis added) (citations omitted).

As the HMT on exports implicates taxpayers' rights to just compensation under the Takings Clause, the general rule that the United States must expressly consent to liability for interest does not apply. Rather, it is the exclusive role of the Judicial Branch to determine what constitutes just compensation:

> It does not rest with . . . Congress or the legislature . . . to say what compensation will be paid, or even what

> shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and *the ascertainment of that is a judicial inquiry.*

Monongahela, 148 U.S. at 327 (emphasis added).

Moreover, in exercising this exclusive role, the Court has made clear that where, as here, the government invests confiscated assets in its own obligations,[6] just compensation under the Fifth Amendment includes interest earned on the taking:

> The Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor. But the claim here is not for interest to be paid by the United States in the sense of the rule. It is for income, derived from an investment . . . in obligations of the United States, which income has been actually received by the Treasury and is in its possession . . . . Whether the Government shall pay interest on its obligations depends upon Congressional assent; but it cannot confiscate the property belonging to a citizen, or the increment of the proceeds into which such property has been converted any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution.

Henkels v. Sutherland, 271 U.S. 298, 301 (1926).

Furthermore, since just compensation requires a "full and perfect equivalent for the property taken" (*Monongahela*, 148 U.S. at 326), the Court has held that the constitutional mandate requires interest from the date of taking to the date

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[6] The Secretary of the Treasury is required by statute to invest HMT payments in interest-bearing obligations of the United States. 26 U.S.C. § 9602(b)(1) (1994). Interest earned on those obligations is retained in the Harbor Maintenance Trust Fund. 26 U.S.C. § 9602(b)(3) (1994).

of compensation, even in cases where a taking is otherwise lawful. *See United States v. Hotel Thayer Co.*, 329 U.S. 585 (1947) (stating that in certain circumstances where United States lawfully confiscates property under its power of eminent domain, just compensation requires that property owner receive interest from date of taking to date of payment).

Accordingly, to complement the statutory inquiry, the Court should also grant the petition in order to consider whether, if the court of appeals is correct in its interpretation of the statutes, there has been an unconstitutional taking that has confiscated millions of dollars in interest from several thousand taxpayers, in derogation of the Takings Clause and this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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